INDEX.

PAGE

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes involved 3

Statement of the case 3

Specifications of error 5

Reasons for granting the writ 5

Argument 9

I. *The construction placed upon Section 176 by the Supreme Court of Kansas prior to its adoption by the Oklahoma Legislature became the law of Oklahoma with such adoption and should have been followed by the Court of Appeals in this case* 10

II. *The decision of the Court of Appeals is in conflict with decisions by the Eighth and Ninth Courts of Appeals* 13

III. *The opinion of the Court of Appeals is in conflict with the principles announced by the Supreme Court of Oklahoma in construing Section 176* .. 13

IV. *The Kansas decisions are in accord with the decisions of other States having identical or similar statutes* 17

V. *The Court of Appeals misconstrued 50 U. S. C. A. Appendix, Sec. 525, by holding that "redemption of real property sold" should be interpreted so as to apply to the equitable right to redeem real property from a mortgage indebtedness prior to sale* 18

Section 525 applies only to redemption of real property sold and there is no redemption after sale in Oklahoma 20

Conclusion 22

APPENDIX.—Statutes involved 23

PAGE

Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161.....17, 18
Berke v. Home Owners' Loan Corp., 192 Okl. 124, 134 P. (2d) 346, 347 .....13, 19
Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815..... 16
Bradshaw v. Eudaly, 202 Okl. 640, 217 P. (2d) 522.... 15
Brown v. Leslie, 192 Okl. 43, 133 P. (2d) 551, 552..... 2
Citizens' & Contractors' Bank v. Maddox, 175 Ga. 779, 166 S. E. 227 18
Ebert v. Poston, 266 U. S. 548..... 22
Gay v. Parpart, 106 U. S. 679, 696, 697..... 14
Glaze v. Johnson, (Tex. Civ. App.) 65 S. W. 662..... 14
Harjo v. Johnston, 187 Okl. 561, 104 P. (2d) 985..... 17
Hill v. Persinger, 57 Okl. 663, 157 Pac. 744..... 11
Howard v. Entreken, 24 Kans. 428.....11, 12, 14
Jelks, et al., v. Aetna Life Ins. Co., (10 C. A.) 134 F. (2d) 870 21
Jones v. Driskell, 94 Mo. 190, 7 S. W. 111..... 17
Laughlin v. Fariss, 7 Okl. 1, 50 Pac. 254..... 11
LeMaistre v. Leffers, 333 U. S. 1..... 21
Lockwood v. Moore, (10 C. A.) 86 F. (2d) 689, 691.... 14
Mackey v. Lefeber, 172 Okl. 99, 45 P. (2d) 148..... 15
Martin v. Gilmore, 72 Ill. 193, 199, 200 14
National Surety Corp. v. Wunderlich, (8 C. A.) 111 F. (2d) 622 .....7, 13
Noble v. Harriman, 58 Okl. 117, 158 Pac. 1148..... 11
Pritchard v. Madren, 31 Kans. 38, 2 Pac. 691.....11, 12
Rodesney v. Robins, 184 Okl. 457, 88 P. (2d) 333..... 10
Scudder v. Sargent, 15 Neb. 102, 17 N. W. 369.....17, 18
Siddell v. McMillan, 45 Okl. 800, 146 Pac. 911..... 15
State v. Wilkin, 202 Okl. 177, 211 P. (2d) 509..... 20
Streets v. Stephens, 191 Okl. 289, 129 P. (2d) 848, 849..5, 21
Sunray Oil Corp. v. American Royalty Petrol. Co., 203 Okl. 637, 224 P. (2d) 965..... 15
Texas Co. v. Dunlap, (Tex. Com. App.) 41 S. W. (2d) 42, 43, 44 14
Turben v. Douglass, 76 Okl. 78, 183 Pac. 881..... 16
Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462, 463....13, 16

TABLE OF CASES—Continued.

PAGE

Welsh v. Barber Asphalt Paving Co., (9 C. A.) 167 Fed. 465 ..... 7, 13
West v. American Tel. & Tel. Co., 311 U. S. 223, 236-7 .. 6, 9
Z. J. Fort Produce Co. v. Southwestern Gr. & Prod. Co., 26 Okl. 13, 108 Pac. 386 11

STATUTES.

G. S. Kans. 1889, Vol. 2, Sec. 4160 (Sec. 77 of Code) ... 10
Okla. Sess. Laws 1907-1908, p. 697 10
12 O. S. 1941, Sec. 176 ..... 2, 3, 5, 10, 23
12 O. S. 1941, Sec. 1031 16
12 O. S. 1951, Secs. 3-4, and 180 15
75 O. S. 1951, Sec. 135 10
28 U. S. C. A., Sec. 1254(1) 2
50 U. S. C. A. App., Sec. 520 23
50 U. S. C. A. App., Sec. 525 ..... 2, 4, 8, 19, 24

TEXT BOOKS.

37 Am. Jur. 212 20
50 Am. Jur. 472 6
55 Am. Jur. 1082, and 1066-7 16
34 C. J. 344, and 385-6 18
Freeman on Judgments, 5th ed., Sec. 303 18
House Rep. 2198, 77th Congress, 2nd Sess. 21
Pomeroy's Equity Juris., 4th ed., Vol. 1, p. 43, Sec. 40 .. 17
Thompson on Real Property (Perm. Ed.), Vol. 9, p. 585, Sec. 5095 20

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No. .....

Shell Oil Company, *Petitioner,*

vs.

R. O. Wilkin; Walter E. Hocker, Jr.; Martha Hocker; F. M. Hocker, Nellie M. Scott and Carmen Gilkerson, Executrices of Estate of J. G. Scott, Deceased; Carmen Gilkerson; Nellie M. Scott; Merial Scott; John Lee Scott; Eugene A. Grubitz, 3rd; Doris Grubitz; W. R. Withington; Robert P. Singletary; and W. J. Singletary, Jr., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on June 11, 1952, which reverses the trial court with directions to cancel a one-half interest in petitioner's three oil and gas leases.

Opinions Below.

The opinion of the District Court (R. 111-117) is unreported. The opinion of the Court of Appeals (R. 143-159, 163-164), is reported at 197 F. (2d) 42.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 11, 1952. (R. 164-165) The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254(1).

Questions Presented.

1. Where a statute is adopted by Oklahoma from Kansas and the Oklahoma Supreme Court holds such adoption included the prior construction placed upon the statute by the Supreme Court of Kansas, are the federal courts bound to follow the Kansas construction prior to adoption?

2. Is a vendee who purchases from a plaintiff subsequent to a judgment based on publication notice and prior to commencement of proceedings to reopen and vacate such judgment a purchaser *pendente lite* under Section 176 of the Oklahoma publication statute? (12 O. S. 1941, Sec. 176.)

3. Is such vendee denied the status of a purchaser in good faith because he is the vendee of a plaintiff who purchased at his own judicial sale?

4. Does the phrase "redemption of real property sold," as used in 50 U. S. C. A. App., Sec. 525, apply to a mortgage foreclosure sale in Oklahoma, where there is no right of redemption after sale?

5. Other questions involved which are not of sufficient importance in themselves to justify the granting of a writ are:

(*a*) Does an action against a trustee (*Brown* v. *Leslie,* 192 Okl. 43, 133 P. (2d) 551, 552) for an accounting for bonuses received for oil and gas leases (R. 23-25), successfully prosecuted to final judgment (R. 35-36) and affirmed by the Supreme Court of Oklahoma (R. 37), constitute an irrevocable ratification of such leases?

(*b*) Does a delay of more than three years before attempting to withdraw such ratification, while such leases increased in value from $600 to $200,000, (R. 46-47) constitute laches?

Statutes Involved.

See Appendix, pages 23-24.

Statement of the Case.

Shell Oil Company brought this action in the United States District Court for the Western District of Oklahoma against R. O. Wilkin, *et al.*, to quiet title to three oil and gas leases purchased by it from the State of Oklahoma. The State obtained title by foreclosing a mortgage and purchasing at the foreclosure sale. The sale was confirmed by the court (R. 18-19). R. O. Wilkin, who owned the surface and a one-half mineral interest, subject to State's mortgage, was served by publication while serving in the U. S. Army. (R. 21) Owners of the other one-half mineral interest were personally served with summons. (R. 11) The foreclosure proceedings were regular on their face. After the term of court and time for appeal had expired, Shell, relying on the validity of the foreclosure proceedings (R. 21), purchased three oil and gas leases from the State. (R. 19-20)

Within the three-year statutory period allowed parties served by publication, Wilkin, in April, 1946, filed an application under 12 O. S. 1941, Sec. 176, to reopen and vacate the foreclosure judgment and order of confirmation and to cancel the sheriff's deed, and for an accounting against State for all bonuses and rentals received from oil and gas leases sold to Shell. (R. 21-25) Shell was not made a party to the vacation proceedings (R. 26) and had no notice thereof (R. 47) until after judgment (R. 34-37) had been ren-

dered as prayed for in the application. This judgment was affirmed by the Supreme Court of Oklahoma. (R. 37)

Shell instituted this action to quiet title to its leases in the United States District Court in June, 1949 (R. 1), the month after Wilkin refused to accept the delay rentals tendered him under the terms of Shell's leases. (R. 47) The trial court rendered judgment in favor of Shell quieting its title on the ground that the foreclosure judgment was valid on its face and that since Shell was not made a party to the proceedings to vacate the foreclosure judgment and order of confirmation in the state court, the vacation judgment was "inadmissible against it on the well established principles that voidable judicial proceedings are not subject to collateral attack and that judicial proceedings concerning the title to property are not binding upon grantees of parties thereto if the grant was made prior to the institution of such proceedings." (R. 111-117)

The Court of Appeals reversed the trial court as to the surface and the one-half mineral interest owned by Wilkin and his assigns, but affirmed Shell's title to its oil and gas leases as to the one-half mineral interest owned by the parties personally served in the foreclosure action. (R. 163-164) The Court of Appeals held: (*1*) That Shell was a purchaser *pendente lite* as to Wilkin's interest (R. 153-155); (*2*) that Shell was not a purchaser in good faith within the meaning of that phrase as used in Section 176 solely because it was the vendee of a plaintiff who purchased at its own judicial sale (R. 152-153); (*3*) that Wilkin did not ratify Shell's leases (R. 157-158); and (*4*) that while the phrase "redemption of real property sold," as used in 50 U. S. C. A. App., Sec. 525, if literally construed, would apply only to a redemption period after sale, and while the

question is not free from doubt, the Act should be literally construed so as to apply to the equitable right to redeem from a mortgage indebtedness prior to sale.[1] (R. 155-157)

Specifications of Error.

The Tenth Court of Appeals erred:

1. In failing and refusing to follow the law of Oklahoma as expressed by the decisions of the Supreme Court of Kansas prior to adoption of 12 O. S. 1941, Sec. 176;

2. In holding that Shell purchased *pendente lite;*

3. In holding that Shell was not a purchaser in good faith;

4. In holding that 50 U. S. C. A. App., Sec. 525, is applicable to the equitable right of redemption from the mortgage indebtedness prior to sale.

Reasons for Granting the Writ.

1. Oklahoma adopted its publication statute from Kansas. (12 O. S. 1941, Sec. 176.) Prior to such adoption the Supreme Court of Kansas had held (as did the trial court in this case) that the grantee of a party litigant after judgment based on publication notice, and prior to the commencement of proceedings to reopen and vacate such judgment, did not purchase *pendente lite* and that a vacation judgment rendered against his grantor was not admissible in evidence in a subsequent action brought by or against such grantee. Although this question was argued and the Kansas cases cited in every brief filed by Shell in the Court of Appeals, the opinion of that court is in direct conflict with the Oklahoma cases holding these Kansas decisions

1. Under Oklahoma law a mortgage debtor has no right to redeem after the real property is sold. Streets v. Stephens, (1942) 191 Okl. 289, 129 P. (2d) 848, 849.

were adopted as the law of Oklahoma, and is in direct conflict with these early Kansas decisions. This raises the question as to whether the federal courts are required to follow the decisions adopted by a legislature along with the statutes from another state, when the Supreme Court of the adopting state holds such decisions are binding on the courts of such adopting state. Clearly this question is of nationwide importance. Every state in the Union, the District of Columbia, and the Territories have adopted statutes from other jurisdictions. The universal rule is that in adopting such statutes the legislatures are presumed to have adopted the prior decisions. 50 Am. Jur. 472 cites cases from this Court and from 35 states in support of this rule. Litigants in every one of these states would be vitally affected by the rule applied by the Court of Appeals in this case. Settlement of this question by this court is plainly in the public interest, since the same question can arise in any litigation in the federal courts involving a statute adopted from another jurisdiction. In 1940 this court granted a writ of certiorari in *West* v. *American Telephone & Telegraph Company*, 311 U. S. 223, and, in reversing the Court of Appeals for the Sixth Circuit, held that the federal courts were bound to follow a decision of an intermediate appellate court for the State of Ohio, since the highest court of the state had not passed upon the question. We submit that the question here presented not only has greater merit, but that it is of much greater public interest than the question presented in that case. Intermediate appellate court decisions are not statewide in their effect, whereas interpretations adopted from other states along with a statute are given statewide effect. As to public interest, only a very few states in the United States have intermediate appellate courts, but every state has adopted statutes from other jurisdictions.

2. The decision of the Tenth Court of Appeals in this case, in refusing to be bound by and to follow these early Kansas decisions, is in direct conflict with the decision of the Ninth Court of Appeals in *Welsh* v. *Barber Asphalt Paving Co.*, (9 C. A., 1909) 167 Fed. 465, and of the Eighth Court of Appeals in *National Surety Corporation* v. *Wunderlich*, (8 C. A., 1940), 111 F. (2d) 622, holding that interpretations placed on statutes prior to their adoption, and adopted along with such statutes, are binding upon a federal court.

3. The question of whether a purchaser after judgment based upon publication notice purchases *pendente lite* and is bound by a vacation judgment against his grantor is of great public interest, as it affects many land titles in the State of Oklahoma. Literally hundreds of Oklahoma titles are based on judicial sales upon publication notice wherein the plaintiff purchased and sold to a stranger within the three-year period. In most of these cases the plaintiff did not retain any title, and therefore has no great interest in defending proceedings brought to vacate such judgment. The decision of the Court of Appeals places all such titles in jeopardy for a period of three years. Under such decision the judgment upon which the vendee relied may (*as in this case*) be vacated without his knowledge and without giving him an opportunity to be heard. Opportunity for connivance between a plaintiff and a defendant after property had increased in value would further jeopardize a vendee's title. The opinion of the Court of Appeals is not only contrary to the early Kansas decisions, but it is contrary to the principles announced in all Oklahoma decisions interpreting Section 176, and is contrary to direct holdings of the Supreme Court of Oklahoma in interpreting proceedings brought to vacate judgments under companion

statutes. The attorneys of Oklahoma have always construed a purchaser after judgment under Section 176 as a non-*pendente lite* purchaser, as signified by the fact that, although there have been a number of Oklahoma cases in which a vendee was given notce and made a party to the reopening and vacation proceedings, this is the first reported case involving Oklahoma property in which such vendee was not made a party to the reopening proceedings. It is significant that in this case Shell was intentionally omitted, as shown by the fact that Wilkin, in his application to reopen, described Shell's leases in detail and sued the State of Oklahoma for an accounting for the bonuses and delay rentals received from Shell under its oil and gas leases. (R. 23-25) Settlement of this question by this court is plainly in the public interest, since it will tend to stabilize titles in the State of Oklahoma.

4. Under Oklahoma law a mortgage debtor does not have a right of redemption *after* the foreclosure sale.[1] 50 U. S. C. A. App., Sec. 525, provides that the time spent in military service shall not "be included in computing any period now or hereafter provided by any law for the redemption of real property *sold* • • •." The Court of Appeals held that while this section, "if literally construed, would apply only to a redemption period after a sale of land" (R. 155-156), and that "While the question is not free from doubt • • •" (R. 156), it should be given a liberal construction so as to include the right to redeem by paying off the mortgage indebtedness *prior to sale.* The question of whether "redemption of real property *sold,*" as used in Section 525, is applicable to the equitable right to redeem from a mortgage indebtedness *prior to sale,* is of importance in every state which, like Oklahoma, does not provide

for a statutory right of redemption after sale. This question has never been decided by this court, and the decision of the Court of Appeals will unsettle titles not only in Oklahoma, but in all other states similarly situated, until the question has been passed upon by this court.

ARGUMENT.

A state is not without law before its Supreme Court has spoken directly upon a point, and it is the duty of a federal court to ascertain from all available data what the state law is.[2] While, as stated by the Court of Appeals, *the Oklahoma Supreme Court "has not passed directly upon the question* of whether an action continues to pend within the doctrine of *lis pendens,* where the judgment was obtained against a party without other service than by publication in a newspaper, until the time within which such judgment may be vacated under Section 176 * * *" (R. 154), nevertheless the law of Oklahoma is as conclusive upon this point as if the Supreme Court had passed *directly* upon the question. The Oklahoma law is determined from the following data:

1. Decisions adopted by the Oklahoma Legislature from Kansas when it adopted the publication statute from that state;

2. Decisions of the Supreme Court of Oklahoma reaching results that could not have been obtained without holding a purchaser under 12 O. S. 1941, Section 176, does not purchase *pendente lite;*

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2. West v. American Telephone and Tel. Co., 311 U. S. 223, 236-7.

3. Decisions of the Supreme Court of Oklahoma interpreting companion statutes providing for the vacation of judgments which hold that a purchaser during the period allowed for the bringing of proceedings to vacate a judgment does not purchase *pendente lite;*

4. Decisons from other states having identical or substantially equivalent statutes.

I. The construction placed upon Section 176 by the Supreme Court of Kansas prior to its adoption by the Oklahoma Legislature became the law of Oklahoma with such adoption and should have been followed by the Court of Appeals in this case.

Section 176 was adopted from Kansas by the Oklahoma Territorial Legislature in 1893[3] along with the other provisions of the Code of Civil Procedure. This section was taken from G. S. Kans. 1889, Vol. 2, Sec. 4160 (Sec. 77 of Code), *which is identical with the present Oklahoma statute.* The Oklahoma Legislature recognized the binding effect of the Kansas decisions prior to such adoption at its first session, wherein, in arranging for the printing of the first Oklahoma statutes, it provided that:

> "• • • The annotations shall be thorough and • • • the code of civil procedure in addition thereto shall contain annotated references to the decisions of the supreme court of Kansas • • • construing such section • • •." Session Laws 1907-1908, p. 697.

A similar provision has been carried forward in each succeeding act of the Oklahoma Legislature providing for the printing of Oklahoma statutes. The latest was by the 1951 Legislature.[4] The Oklahoma Supreme Court has without

3. Rodeaney v. Robins, (1939) 184 Okl. 457, 88 P. (2d) 333; 12 O. S. 1941, Sec. 176, Note.

4. 75 O. S. 1951, Sec. 135.

exception held these prior Kansas decisions become the law of Oklahoma and are "binding,"[5] "controlling,"[6] and "conclusive upon this court."[7] Forty-two years ago the Oklahoma Supreme Court, in *Z. J. Fort Produce Co.* v. *Southwestern Grain & Produce Co.*, (1910) 26 Okl. 13, 108 Pac. 386, said:

> "It has been so often decided that the construction of a statute made by the Supreme Court of Kansas before the adoption of the statute by the territorial Legislature is *binding upon this court* that the citation of authorities is not necessary, and our decision upon the questions raised by this proceeding is concluded by the foregoing cases from that jurisdiction." (p. 388) (Emphasis supplied.)

This rule has been applied to the identical statute under consideration. In *Hill* v. *Persinger*, (1916) 57 Okl. 663, 157 Pac. 744, the court in discussing and applying the Kansas interpretation to Sec. 176 said:

> "• • • This statute was taken from Kansas and was construed prior to its adoption • • •." (p. 745)

What then was the law of Kansas prior to adoption of the publication statute by Oklahoma? The answer is found in *Howard* v. *Entreken*, 24 Kans. 428, decided in 1880, 13 years prior to such adoption; and in *Pritchard* v. *Madren*, 31 Kans. 38, 2 Pac. 691, decided in 1883, 10 years prior to such adoption.

The *Howard* and *Pritchard* cases each involved a default judgment rendered on service by publication. The *Howard* case was a quiet title suit. The *Pritchard* case was *a foreclosure action in which the plaintiff became the pur-*

5. Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co., (1910) 26 Okl. 13, 108 Pac. 386.

6. Noble v. Harriman, (1916) 58 Okl. 117, 158 Pac. 1148.

7. Laughlin v. Fariss, (1897) 7 Okl. 1, 50 Pac. 254.

chaser. In each case, as here, the plaintiff later sold to a third party. In each case, as here, the third party purchaser was not made a party to the proceedings to reopen and vacate the judgment. In each case, as here, a subsequent action was brought. The subsequent actions in both Kansas cases were ejectment actions, whereas Shell brought a suit to quiet title to its leases. In each of the Kansas cases it was held the vacation judgment was not binding on the vendee who was not a party to the vacation proceedings. In *Howard* v. *Entreken* the Supreme Court of Kansas, in holding the vacation judgment was not admissible in evidence against the purchaser, said:

> "• • • no decree subsequently made in the suit against Joel Abbott could affect the interest of Torbett Entreken." (p. 431)

Entreken was the purchaser. In *Pritchard* v. *Madren* the court said:

> "• • • It appears that on the second trial • • • the judgment was reduced • • • but this modification of the original judgment certainly cannot have the force or effect to destroy the title to the property already vested in Mrs. Madren." (pp. 697-698)

Mrs. Madren (like Shell) was the vendee of a plaintiff who purchased at its own judicial sale. If, as the Court of Appeals held in this case, Entreken and Madren purchased *pendente lite,* they would have stood in the shoes of their grantors, would have been bound by the vacation of the judgments, their titles would have been destroyed, and the vacation judgments would have been admissible in evidence as against them. These two Kansas cases established the law of Kansas prior to the adoption of the publication statute by the Oklahoma Legislature. Upon such adoption these cases became the law of Oklahoma. In 69 years they have

not been deviated from either directly or in principle, and they are binding upon the federal courts.

II. The decision of the Court of Appeals is in conflict with decisions by the Eighth and Ninth Courts of Appeals.

In holding that the two Kansas cases interperting Section 176 prior to adoption by Oklahoma were not binding on it, the decision of the Court of Appeals in this case is in conflict with decisions by the Ninth Court of Appeals in 1909[8] and by the Eighth Court of Appeals in 1940.[9] In *Welsh* v. *Barber Asphalt Paving Co.*[8] the Ninth Court of Appeals held that the interpretation placed on a Washington statute prior to its adoption by Oregon

> "• • • became a part of the law when it was adopted in Oregon, and is, we think, binding upon a Federal court." (p. 472)

III. The opinion of the Court of Appeals is in conflict with the principles announced by the Supreme Court of Oklahoma in construing Section 176.

In *Siddell* v. *McMillan,* 45 Okl. 880, 146 Pac. 911, the Supreme Court of Oklahoma held that a judgment based on publication notice is a *final judgment* even as between the plaintiff and the defendant. The order of confirmation was a final judgment.[10] A purchaser after final judgment not appealed from, and after the term of court has adjourned, does not purchase *pendente lite.*[11] Shell was such purchaser. The Court of Appeals, in holding Shell purchased *pendente lite,* relies upon four cases cited under

8. Welsh v. Barber Asphalt Paving Co., (9th C. A., 1909) 167 Fed. 465.
9. National Surety Corp. v. Wunderlich, (8th C. A., 1940) 111 F. (2d) 622.
10. Berke v. Home Owner's Loan Corp., (1943) 192 Okl. 124, 134 P. (2d) 346.
11. Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462, 463.

footnote 10 (R. 154), two cases from Texas,[12] one from Illinois,[13] and one from this court which involved Illinois law[14] The Court of Appeals overlooked the fact that under the laws of Illinois[13] and Texas[12] judgments based on publication notice are *interlocutory* and not final judgments. In *Howard* v. *Entreken* (1880), 24 Kans. 428, the Supreme Court of Kansas, *in distinguishing and refusing to follow the Illinois case cited by the Court of Appeals,* said:

> "• • • The case of *Martin* v. *Gilmore,* 72 Ill. 193, cited by counsel, *is not applicable,* as the law of Illinois of 1845, construed therein, makes a decree rendered upon service by publication merely *interlocutory.*" (p. 431) (Emphasis supplied.)

The Court of Appeals not only failed to apply *Howard* v. *Entreken,* which became the law of Oklahoma upon adoption of the publication statute, but it cited and followed *Martin* v. *Gilmore*[13] from Illinois, *which the Supreme Court of Kansas distinguished and refused to follow.* The federal courts may not apply the Illinois rule construing a different type statute and refuse to follow the Kansas case, adopted by Oklahoma, which held the Illinois case "is not applicable."

It is probable that the error of the Court of Appeals in applying cases from Texas and Illinois involving interlocutory judgments is a continuation of a misinterpretation of the Oklahoma law as pronounced by it as dictum in *Lockwood* v. *Moore* (10 C. A.), 86 F. (2d) 689, 691, to the effect that under the Oklahoma publication statute a judgment is *interlocutory* as between the parties. *This dictum by the*

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12. Glaze v. Johnson, (Tex. Civ. App.) 65 S. W. 662; Texas Co. v. Dunlap, (Tex. Com. App.) 41 S. W. (2d) 42, 43, 44.

13. Martin v. Gilmore, 72 Ill. 193, 199, 200.

14. Gay v. Parpart, 106 U. S. 679, 696, 697.

Tenth Court of Appeals is contrary to the Oklahoma law as announced in *Siddell* v. *McMillan,* 45 Okl. 800, 146 Pac. 911, to the effect that a judgment based upon publication notice is *a final judgment.*

The foreclosure action was a suit in equity.[15] On the other hand, the proceeding to reopen the foreclosure judgment and order of confirmation was neither an action at law nor in equity. It was a special proceeding.[16] There is a statutory distinction between a special proceeding and civil actions in equity.[17] The action in equity terminated with final judgment, and the special proceeding did not commence until the filing of the application to reopen. *In the interim there was no pending case.*

An applicant to reopen under Section 176 (Appendix, p. 23) must make it appear to the satisfaction of the court that *"during the pendency of the action"* he had no actual notice thereof. This phrase is used twice in Section 176. Throughout the statute *the past tense is used.* It refers to a period of time which has already expired. This means that an action ceases to pend with final judgment based on publication notice; otherwise the phrase "during the pendency of the action" has no meaning.

In *Sunray Oil Corporation* v. *American Royalty Petroleum Company,* 203 Okl. 637, 224 P. (2d) 965, the court held that a judgment based on publication notice could not be vacated as against Sunray, who purchased an oil and gas lease from the plaintiff during the three-year reopening period. Under an Oklahoma statute[18] the purchaser of an

15. Mackey v. Lefeber, 172 Okl. 99, 45 P. (2d) 148.
16. Bradshaw v. Eudaly, 202 Okl. 640, 217 P. (2d) 522.
17. 12 O. S. 1951, Secs. 3-4.
18. 12 O. S. 1951, Sec. 180.

oil and gas lease *pendente lite* acquires no greater right than his assignor had.[19] If Sunray had purchased *pendente lite,* its title would have failed when the judgment was vacated as against its lessor.[18, 19] *Sunray and Shell purchased during the same statutory three-year period.* If, as the Court of Appeals held (R. 154-155), a purchaser during this three-year period purchases *pendente lite,* Sunray would have been charged with notice of the pendency of the action[20] and it would have been a *mala fide* purchaser and not a purchaser in good faith.[21] In holding that Sunray was a purchaser in good faith and that the vacation of the judgment against its lessor did not affect the title to its oil and gas lease, the *Supreme Court of Oklahoma necessarily held Sunray did not purchase pendente lite.*

All the statutory methods of vacating a judgment are contained in one section of the Oklahoma statutes.[22] This section contains nine subdivisions. The second subdivision allows three years to commence proceedings to vacate a judgment based on publication notice, the fourth allows two years to vacate for fraud, and the eighth allows an infant 12 months after arriving at full age in which to vacate for errors in a judgment. The Supreme Court of Oklahoma, in interperting both the fraud[23] and the infant[24] subdivisions of the statute, has held that a purchaser subsequent to judgment and prior to commencement of proceedings to reopen and vacate such judgment *does not purchase pendente lite. Shell was such purchaser.* Even if Wilkin had vacated the foreclosure judgment for fraud, under the *Van Noy* case[23]

19. Turben v. Douglass, (1919) 76 Okl. 78, 183 Pac. 881.
20. 55 Am. Jur. 1082.
21. 55 Am. Jur. 1066-7.
22. 12 O. S. 1941, Sec. 1031.
23. Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462.
24. Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815.

Shell's title would not be affected, since it was not a party to the vacation proceedings. *Harjo* v. *Johnston,* 187 Okl. 561, 104 P. (2d) 985, cited by the Court of Appeals in discussing another point, does not conflict with the *Van Noy* case on this question. In the *Harjo* case the *purchasers were made parties to the vacation proceedings.* (pp. 988-989) *Regardless of whether Shell was or was not a purchaser in good faith it did not purchase pendente lite, and the vacation judgment entered in a proceeding wherein it was not a party did not affect its title. The trial court correctly held such vacation judgment was inadmissible in evidence against Shell*[24] in this collateral proceeding. (R. 116) This does not mean Shell was an indispensable party to the vacation proceedings, first, because Wilkin elected to recognize Shell's leases and sue the State for bonuses paid by Shell, and second, under all the authorities cited the vacation judgment is effective as against the plaintiff even though his vendee is not a party. Such vacation judgment is not, however, effective as against the vendee unless he is made a party.[23, 24]

IV. The Kansas decisions are in accord with the decisions of other States having identical or similar statutes.

Oklahoma and Kansas are both code states,[25] whereas Texas is and Illinois was at the time the Illinois cases cited by the Court of Appeals were decided noncode states. Many of the code states have publication statutes identical with or substantially the same as the Oklahoma statute, and *in every instance* where they have passed upon the question they have held that a purchaser during the reopening period does not purchase *pendente lite.*[26] The textbook authorities

25. Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 1, p. 43, Sec. 40.

26. Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161; Scudder v. Sargent, 15 Neb. 102, 17 N. W. 369; Jones v. Driskell, 94 Mo. 190, 7 S. W. 111.

are to the same effect.[27] Nebraska had an *identical statute* and in 1883, *10 years before Oklahoma adopted its statute,* the Supreme Court of Nebraska, in *Scudder* v. *Sargent,*[28] said:

> "• • • According to all of the authorities, the action in question *ceased to be pending* upon the rendition of the judgment in November, 1879, whereby the title to the property was found to be in Mrs. Scudder, the grantor. • • • The judgment rendered in November was a *final judgment,* nor does the fact that it was liable to be opened or reversed by proceedings in error deprive it of that character. • • •" (p. 369) (Emphasis supplied.)

Although the Minnesota publication statute does not protect purchasers during the three-year reopening period, *a vendee is entitled to his day in court.* In *Aldrich* v. *Chase*[28] the court, in syllabus 2, said:

> "• • • if he is not made a party to or given notice of such application, the setting aside or modification of the judgment will be, as to him, void and inoperative to affect his title."

Citizens' & Contractors' Bank v. *Maddox,* 175 Ga. 779, 166 S. E. 227, states that to hold the modification of a judgment was binding on a subsequent purchaser not made a party to the reopening proceedings would violate the due process clause of the Constitution.

V. The Court of Appeals misconstrued 50 U. S. C. A. Appendix, Sec. 525, by holding that "redemption of real property sold" should be interpreted so as to apply to the equitable right to redeem real property from a mortgage indebtedness prior to sale.

50 U. S. C. A. App., Sec. 525 (Appendix, p. 24), after

27. Freeman on Judgments, 5th Ed., Sec. 303; 34 C. J. 344; 34 C. J. 385-6.

providing that certain statutes of limitation shall be tolled during the period any person is in military service, states:

> "* * * nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property *sold* or forfeited to enforce any obligation, tax, or assessment."

There are three distinct reasons why Section 525 of the Relief Act is not applicable to the case at bar:

1. Section 525 applies only to redemption of real property sold and there is *no right of redemption after sale in Oklahoma.*[32]

2. The order confirming the sale to the State was a final judgment.[28] This final judgment must be reopened and vacated before the foreclosure judgment could be paid. Since Shell did not purchase *pendente lite,* the vacation of the order of confirmation against the State did not affect Shell's title. The order of confirmation is still a valid judgment in so far as Shell is concerned.

3. Wilkin did not attempt to redeem under Section 525. He did exactly the opposite. He obtained a judgment vacating the foreclosure judgment and order of confirmation and cancelling the sheriff's deed. (R. 35-36) Thereafter there was no sale; there was not even a judgment in so far as the State was concerned. Redemption from a sale or even from a judgment is inconsistent with vacating such judgment. The relief granted Wilkin by the Supreme Court of Oklahoma was under the State and

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28. Berke v. Home Owners' Loan Corporation, (1943) 192 Okl. 124, 134 P. (2d) 346, 347.

Federal reopening statutes and not under Section 525.[29] *If Wilkin had a right to redeem, it would not have been necessary for him to vacate the foreclosure judgment and order of confirmation.*

Section 525 applies only to redemption of real property sold and there is no redemption after sale in Oklahoma.

The phrase "redemption of real property sold" is not a new phrase. It was not coined by the authors of Section 525. It is a phrase that is recognied by all the textbook writers on mortgage foreclosures, and by the decisions of the appellate courts.[30] These authorities recognize two different and distinct rights of redemption: (*1*) A statutory right of "redemption of real property sold," and (*2*) an equitable right of redemption from a mortgage lien by paying the mortgage indebtedness. The distinction between these two types of redemption is very real.[30]

Two questions present themselves: *First*, which type of redemption is permitted under Oklahoma statutes? *Second*, which type of redemption did Congress intend to extend by Section 525 of the Relief Act? Historically, a mortgagor could always redeem from a mortgage lien by paying off the mortgage indebtedness before his equity of redemption was foreclosed and thereby clear his property from the encumbrance of the mortgage. However, the redemption of real property sold is a creature of statutory law.[31] At common law, after decree of foreclosure and sale there was no right of redemption. 37 Am. Jur. 211. Since Oklahoma does

29. State v. Wilkin, 202 Okl. 177, 211 P. (2d) 509, wherein the Supreme Court held: "* * * we find the action of the trial court was justified under Tit. 50, U. S. C. A. Appendix, Sec. 520(4), and Tit. 12, O. S. 1941, Sec. 176." (p. 510)

30. Thompson on Real Property (Perm. Ed.), Vol. 9, p. 585, Sec. 5095; 37 Am. Jur. 212.

31. "No right of redemption (after sale) exists outside the statute, * * *" Thompson on Real Property (Perm. Ed.), Vol. 9, p. 585, Sec. 5095.

not have such statute, the right to redemption after sale does not exist in that state.[32] In *Jelks, et al.*, v. *Aetna Life Ins. Co.*[32] the Tenth Court of Appeals said:

> "Under the law of Oklahoma, the debtor may not redeem after the foreclosure sale." (p. 871)

The next question is, what did Congress intend by Section 525 of the Relief Act? We submit that, in view of this well-recognized distinction between redemption after sale and before sale, Congress used the phrase "redemption of real property *sold*" advisedly and intended that it be applied only to the statutory right of redemption *after sale.* Congress knew this right did not exist in all the states, but it was not creating any new rights. It merely extended the time within which rights granted by state law could be exercised. It did not grant a soldier any rights a civilian did not have under the state laws. It merely gave the soldier a longer period of time to exercise such rights. It used unambiguous language. If Congress had intended to apply Section 525 to periods within which debts could be paid before judgment or sale, it would have used language much more appropriate than the phrase "redemption of real property sold." Even if the language used in Section 525 of the Relief Act were ambiguous, the intention of Congress, as expressed by House Rep. 2198, 77th Congress, 2nd Sess., would clarify such ambiguity. Therein it was stated:

> "The running of the statutory period during which real property may be redeemed *after sale* to enforce any obligation, tax or assessment is likewise tolled * * *." (Emphasis supplied.)

This court, in *LeMaistre* v. *Leffers,* 333 U. S. 1, cited by the Court of Appeals, in referring to Section 205 (now Section 525), said:

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32. Streets v. Stephens, (1942) 191 Okl. 289, 129 P. (2d) 848, 849; Jelks, et al., v. Aetna Life Ins. Co., (10th C. A.) 134 F. (2d) 870.

> "• • • It covers 'any period • • • provided by any law for the redemption of real property *sold* or forfeited,' etc. • • •" (p. 4)

The Court of Appeals has deleted the word "sold" from the statute.

This court, in *Ebert* v. *Poston*, 266 U. S. 548, reversed the Supreme Court of Michigan for too liberally construing this same Relief Act before it was amended, and in so doing said:

> "• • • A *casus omissus* does not justify judicial legislation. • • • This act is so carefully drawn as to leave little room for conjecture. It deals with a single subject, and does so comprehensively, systematically, and in detail. • • • Such care and particularity in treatment preclude expansion of the act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions. • • •" (p. 554)

Section 525 of the Relief Act applies only to "redemption of real property sold." Under Oklahoma law a debtor may not redeem after the foreclosure sale; therefore the redemption portion of the Relief Act is not applicable to a mortgage foreclosure sale in the State of Oklahoma.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX.

STATUTES INVOLVED.

The pertinent statutes are as follows:

12 Okl. Stat. 1941, Sec. 176, reads:

"A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, or other evidence that *during the pendency of the action* he had no actual notice thereof in time to appear in court and make his defense; *but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section,* nor shall they affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by his section, shall be allowed to present counter affidavits or other evidence to show that *during the pendency of the action* the applicant had notice thereof in time to appear in court and make his defense. R. L. 1910, Sec. 4728."

"Gen. St. Kan. 1889, par. 4160."

50 U. S. C. A. App., Sec. 520, in part, reads:

"(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of

such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. *Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act * * * shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.*"

50 U. S. C. A. App., Sec. 525, in part, reads:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law * * * for the bringing of any action or proceeding in any court * * * by or against any person in military service * * *, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the *redemption of real property sold* or forfeited to enforce any obligation, tax, or assessment."

(Emphasis supplied.)

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	4

TABLE OF CASES

Cudjo v. Harris, 119 Okla. 69, 248 Pac. 343	3
Erie R. Co. v. Tompkins, 304 U. S. 64, 78	3
Fowler v. Humphrey Investment Co., 142 Okla. 220, 286 Pac. 867	3
Harding v. Gillett, 25 Okla. 199, 107 Pac. 665	3
Illinois National Bank v. Gwinn, 390 Ill. 345, 358-359, 61 N. E. (2nd) 249, 256	4
Mobley v. State, 198 Okla. 250, 177 Pac. (2nd) 503	3
Moore v. Illinois Central R. Co., 312 U. S. 630	3
Smith v. Hughes, 135 Okla. 296, 275 Pac. 628	3
State v. Schneider, 197 Okla. 57, 168 Pac. (2nd) 288	4
State v. Warden, 197 Okla. 97, 168 Pac. (2nd) 1010	3
Texarkana v. Arkansas Louisiana Gas Co., 306 U. S. 188, 198-202	3

STATUTES

42 O. S. A. 18	3
42 O. S. A. 19	4
64 O. S. A. 52 (j)	4
Soldiers and Sailors Relief Act, 50 U. S. C. App. Sec. 525	2

In The

Supreme Court of the United States

October Term 1952

No.

R. O. Wilkin; Walter E. Hocker, Jr.; Martha Hocker; F. M. Hocker, Nellie M. Scott and Carmen Gilkerson, Executrices of Estate of J. G. Scott, Deceased; Carmen Gilkerson; Nellie M. Scott; Merial Scott; John Lee Scott; Eugene A. Grubitz, 3rd; Doris Grubitz; W. R. Withington; Robert P. Singletary; and W. J. Singletary, Jr.,

Cross-Petitioners,

vs.

Shell Oil Company,

Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This is a conditional cross-petition for a writ of certiorari filed in connection with the petition of Shell Oil Company v. Wilkin, et al. (present cross-petitioners) No. 272 this Term. The present cross-petitioners have opposed the grant of certiorari in No. 272 *supra* but in the event this Court should grant it pray that the Court likewise grant the present cross-petition.

OPINIONS BELOW

The opinion of the District Court (R. 111-117) is unreported. The opinion of the Court of Appeals (R. 143-

149), on rehearing at R. 163-164, is reported at 197 F. (2nd) 42.

JURISDICTION

The judgment of the Court of Appeals on rehearing was entered on June 11, 1952 (R. 164-165). The jurisdiction of this Court is invoked under 28 *U. S. C.* Sec. 1254 (1).

QUESTION PRESENTED BY CROSS-PETITION

The Court below upheld the right of Wilkin, a returned soldier, to redeem his property because of the State's fraud and because of his rights under the *Soldiers and Sailors Relief Act,* 50 U. S. C. App. Sec. 525. However, the Court held that as to the Hockers and the Scotts who owned a one-half interest in the oil and gas rights, the State was not guilty of any fraud and having no service connection they had no rights under the Act. Hence the Court held valid the State's lease to Shell of their one-half mineral rights. The question presented is whether under Oklahoma law the Court had the power to so hold or whether, as we contend, Wilkin, having paid the full amount of the mortgage (which likewise covered the Hockers and the Scotts' interest), redeemed the entire property. If the latter, Wilkin has important rights of contribution from the Hockers and the Scotts of which he has been deprived by the decision below.

STATEMENT

The Court below in its original opinion held, impliedly, that Shell took nothing because of Wilkin's rights of redemption under the *Soldiers and Sailors Relief Act* and because of the fraud of the State, its predecessor in interest, perpetrated on Wilkin. On rehearing the Court

stated that its former opinion was based on the proposition that, as against Wilkin, Shell was not a purchaser in good faith and took its leases subject to Wilkin's right to redeem. Hence, the Court said Shell's leases failed as to Wilkin's one-half interest in the minerals. However, as to the other one-half interest in the minerals, owned by the Hockers and the Scotts, who had no service connection, the Court said that no fraud had been practiced on them by the State and hence Shell's leases on their one-half interest were valid. The present cross-petitioners assert that in so holding the Court below violated settled Oklahoma law that one who redeems mortgaged property redeems it in its entirety and has resulting rights of subrogation.

REASONS FOR GRANTING THE CROSS PETITION

The cross-petitioners contend that the Court below "has decided an important question of local law in a way probably in conflict with applicable local decisions," within the meaning of this Court's Rule 38, par. 5 (6)[1].

It is settled Oklahoma law under 42 *O. S. A.* 18, as construed in *State* v. *Warden,* 197 Okla. 97, 168 Pac. (2nd) 1010; *Mobley* v. *State,* 198 Okla. 250, 177 Pac. (2nd) 503; *Harding* v. *Gillett,* 25 Okla. 199, 107 Pac. 665, that one who redeems mortgaged property redeems it in its entirety.[2] No partial redemption proportionate to his own-

[1] See *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, at 78 holding that except in Federal matters "the law to be applied in any case is the law of the State." This Court has frequently granted certiorari where a federal court in violation of the *Erie* doctrine, failed to apply "applicable local decisions." See *Moore* v. *Ill. Cen. R. Co.,* 312 U.S. 630; *Texarkana* v. *Arkansas Louisiana Gas Co.,* 306 U.S. 188, 198-202.

[2] *Cudjo* v. *Harris,* 119 Okla. 69, 248 Pac. 343; *Fowler* v. *Humphrey Investment Co.,* 142 Okla. 220, 286 Pac. 867; *Smith* v. *Hughes,* 135 Okla. 296, 275 Pac. 628, cited below by Shell involve special circumstances controlled by special statutes.

ership is permitted.[1] Wilkin in fact paid off the entire mortgage, (R. 49, 99) which gave him the right, under 42 *O. S. A.* 19, of subrogation against the other owners benefited. The decision below on rehearing has deprived Wilkin of this right under State law. Wilkin paid off the entire mortgage debt but has gotten back only part of the security.

In so holding the Court has in effect whittled down Wilkin's rights under the *Soldiers and Sailors Relief Act* which contemplates a complete return to the *status quo ante*. (*Illinois National Bank* v. *Gwinn*, 390 Ill. 345, 358-359 61 N. E. (2nd) 249, 256).

CONCLUSION

It is submitted that in the event Shell's petition in No. 272 is granted that the present cross-petition be granted.

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[1] Particularly is this true where the mortgagee is the State which by statute, 64 *O.S.A.* Sec. 52 (j) cannot accept less than the full mortgage payment. (Cf. *State* v. *Schneider*, 197 Okla. 57, 168 Pac. (2nd) 288.)

FILED
AUG 28 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1952

No. 272

SHELL OIL COMPANY,

Petitioner,

v.

R. O. WILKIN; WALTER E. HOCKER, JR.; MARTHA HOCKER; F. M. HOCKER, NELLIE M. SCOTT and CARMAN GILKERSON, Executrices of Estate of J. G. SCOTT, Deceased; CARMEN GILKERSON; NELLIE M. SCOTT; MERIAL SCOTT; JOHN LEE SCOTT; EUGENE A. GRUBITZ, 3RD; DORIS GRUBITZ; W. R. WITHINGTON; ROBERT P. SINGLETARY; and W. J. SINGLETARY, JR.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Counter-Statement of the Case:

A. Wilkin's Military Status 1

B. The Fraud 3

C. Wilkin's Redemption 3

Argument:

I. There Are Unassailable Grounds for the Decision Below:

A. Shell Was Not a Purchaser in Good Faith under 12 O.S.A. Sec. 176 5

B. Wilkin's Redemption Was Valid Under Another Oklahoma Statute 7

II. The Court Below Did Not Refuse to Follow Oklahoma Law 11

III. Res Judicata Bars Shell 13

IV. The Decision Below Was Correct and No Matter of Public Importance Is Involved 14

Conclusion 15

TABLE OF CASES

Arnold v. Joines, 50 Okla. 4, 150 P. 130 ..... 6, 7, 12

Bradshaw v. Eudahy, 202 Okla. 640, 217 P. (2nd) 522 8

Bristow v. Groom, 194 Okla. 334, 151 P. (2nd) 936, 939 6

Brockman v. Roberts, 89 Okla. 57, 213 P. 545, 546 14

Furness-Withy Co. v. Insurance Assn., 242 U. S. 430 1

Harjo v. Johnson, 187 Okla. 561, 104 P. (2nd) 985, 996 ..... 6, 12

Howard v. Entreken, 24 Kans. 308 11

Huddleston v. Dwyer, 322 U. S. 232, 237 12

Illinois National Bank v. Gwinn, 390 Ill. 345, 61 N. E. (2nd) 249, 159 A. L. R. 468 12

Kasner v. Routledge, 199 Okla. 230, 200 P. 243 11

Knoell v. Frisco Lease, 78 F. (2nd) 286 11

Le Maistre v. Leffers, 333 U. S. 1 ..... 8, 12

PAGE

Martin v. Rogers, 151 Okla. 51, 1 P. (2nd) 696..... 11
Mellen v. Moline Iron Co., 131 U. S. 352..... 7
Miller v. Farmers National Bank, 94 Okla. 101, 221 P. 71 7
Morgan v. City of Ardmore, 182 Okla. 542, 78 P. (2nd) 785, 788 ..... 6, 12
Moore v. Zelic, 338 Ill. 583, 170 N. E. 664, 666..... 14
Pritchard v. Madren, 31 Kans. 38, 2 P. 691..... 11
Romig v. Gillett, 187 U. S. 111..... 13
Seifert v. Seifert, 82 Okla. 230, 200 P. 243..... 11
Stacy v. Thrasher, 6 How. 44, 59..... 13
State v. Wilkin, 202 Okla., 211 P. (2nd) 509..... 4, 5
Stuart v. Coleman, 78 Okla. 81, 188 P. 1063..... 7
Texas & N. O. R. Co. v. Neill, 302 U. S. 645..... 14

STATUTES

Soldiers and Sailors Relief Act, 50 U. S. C. Sec. 520.... 2
Sec. 525.. 7, 8, 9, 12
12 O.S.A. Sec. 176..... 5, 6, 11
12 O.S.A. Sec. 760..... 7, 8, 12

In The

Supreme Court of the United States

October Term, 1952

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Shell Oil Company,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

A more accurate statement of the facts will show that there are no important questions of law involved herein [1] and that what was decided below was decided rightly.

A. Wilkin's Military Status:

The respondent Wilkin bought the land herein involved in 1940 subject to a mortgage to the State of Oklahoma

[1] As none, on examination, were found in *Furness, Withy Co.* v. *Insurance Assn.*, 242 U.S. 430.

in the amount of $3,500.00 and subject to ownership of 1/2 of the minerals by Hocker, Scott, et al. (R. 10-11). Wilkin took possession of the land, had a tenant and got Government agricultural payments. Wilkin entered the United States Army on April 18, 1942, and served in this country and in the South Pacific until his honorable discharge February 21, 1946. (R. 78). In the meantime the mortgage got into default and the State commenced foreclosure proceedings. No personal service was had on Wilkin; instead an "affidavit in lieu of mailing" was filed May 10, 1943 reflecting that no notice had been mailed to Wilkin and purported service on him was thereafter made by publication. (R. 11-12, 22). Wilkin had no notice of the foreclosure suit until he got out of the Army in February 1946. (R. 22-23, 83).

To overcome the problem of the *Soldiers and Sailors Relief Act*[2] the State on June 24, 1943, filed an "affidavit with reference to Military and Naval Service and Application for Appointment of Attorney" wherein it was recited that affiant did not know and could not ascertain whether Wilkin was in the military service. An attorney was appointed to represent Wilkin. (R. 12). The same day this attorney filed an answer for Wilkin in the form of a general denial (R. 12), but without making any investigation as to his military status (R. 12). He simply filled out a printed form handed him by Mr. Hippen, the State's attorney, in the court room (R. 77). The same Mr. Hippen had already been notified by Mr. Duncan, another State official, as early as December 15, 1942, that Wilkin was in the Army (R. 109). A carbon copy of a letter dated February 10, 1943, from Mr. Hippen to Mr. Hocker shows that only a few months before the State's affidavit of June 24, 1943, Mr. Hippen knew Wilkin was

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[2] 50 *U.S.C.* App. Sec. 520 prohibiting default judgments unless the Act is complied with.

in the service. Yet on June 24, 1943, the State swore it did not know and could not ascertain whether Wilkin was in the service (R. 110, 12).

B. The Fraud:

The Court below held, as to the above:

> "The affidavit was false. The affiant knew, at the time he made it, that Wilkin was in the military service of the United States, that a copy of his address could be obtained, and that a copy of the petition and of the publication notice could be served upon him by mail." (R. 145).

On the strength of the false affidavit the State got judgment of foreclosure the very day the affidavit was filed. (R. 13-16). The State itself purchased the property at the Sheriff's sale. The sale was confirmed March 13, 1944. (R. 18-19). On May 7, 1945 Carl S. Ford, acting for Shell purchased from the State three oil and gas leases covering Wilkin's land and later assigned them to Shell September 14, 1945 (R. 19-20).

Shell made no independent investigation of Wilkin's army status before it purchased. (R. 47). It is significant, however, that Shell only purchased from the State after investigating to make sure that Wilkin was alive on June 24, 1943 (R. 105), the date the false affidavit as to ignorance of his military status was filed. (R. 12). The slightest inquiry by Shell would have revealed Wilkin was in the Army *if Shell wanted to find out about it.* (See R. 105, 109).

C. Wilkin's Redemption:

When Wilkin was discharged from the Army and discovered the foreclosure he filed on April 13, 1946, within sixty (60) days of his discharge and within three (3) years of the date of the foreclosure judgment, a motion

in the State Court foreclosure suit. (R. 21-23). The motion and its amendments (R. 21-23, 26-27) assailed the legality of the foreclosure proceedings; it set forth Wilkin's rights of redemption under the *Soldiers and Sailors Relief Act* and tendered the necessary money for the redemption of the property. (R. 23, 28).

On demurrer by the State the Court decided in favor of Wilkin (R. 34-35) who thereupon paid over to the State the full amount due on the mortgage, plus all taxes, penalties, costs and interest. (R. 49, 99). The Sheriff's deed to the State was thereupon cancelled. (R. 35-38). Wilkin refused to accept from the State, as an off-set on the amount he owed on the mortgage, the rentals and bonus the State received from Shell. (R. 42-47).

Wilkin's redemption of his land was upheld by the State Supreme Court (*State* v. *Wilkin,* 202 Okla. 177; 211 Pac. (2nd) 509). Shell is said to have first learned of the case while it was on appeal but though invited by the State refused to participate in it in any way. (R. 47-48, 199). It evidently planned to have two days in Court, the first through the State and the second through its own prospective lawsuit which it filed on June 23, 1949 (R. 1) two days after the State lost.

ARGUMENT

I.

There Are Unassailable Grounds for the Decision Below.

Once this Court is advised of the various bases for Wilkin's right to redeem it will readily perceive how little ground for certiorari is presented.

A. *As Shell Was Not a Purchaser in Good Faith the Judgment Below is Sustained by 12 O.S.A. Sec. 176:*

Under this Oklahoma statute[1] a person served by publication has three (3) years within which to move to set aside the judgment. The judgment was entered June 24, 1943 (R. 12); the motion to set it aside and to redeem was filed April 13, 1946 (R. 21). The Supreme Court of Oklahoma sustained Wilkin's rights on this ground. (*State* v. *Wilkin,* 202 Okla. 177, 211 Pac. (2nd) 509). So too did the Court below holding that Shell took its three oil and gas leases with notice that Wilkin could vacate the judgment and redeem the property within three years. It held Shell was not a bona fide purchaser because its vendor, the State, was not a *bona fide purchaser* (R. 152-153),

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[1] 12 *Okl. St. Anno.* 1941, Sec. 176, in part, reads:

"A party against whom a judgment * * * has been rendered, without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall * * * make it appear to the satisfaction of the court, by affidavit, or other evidence that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, * * *." (R. 150)

having purchased pursuant to its own fraud. The Court below stated:

> "A party plaintiff to an action who obtains a judgment therein and purchases at a judicial sale made under such judgment is not a 'purchaser in good faith' within the meaning of that phrase in 12 Okl. St. Anno. 1941, Sec. 176, and if the judgment is vacated for error, irregularity, or fraud, the title of such purchaser fails.[3] The defeasible quality of the title acquired by such a purchaser is engrafted upon it by operation of law. If such a purchaser conveys his title to another, the vendee is charged with notice, with respect to which he may not assert ignorance, that his vendor's title is defeasible, that his vendor is not a purchaser in good faith under Sec. 176, supra, and that if his vendor's title fails, by reason of the reversal or vacation of the judgment, the title acquired by him, as vendee, will also fail.[4] " (R. 152)

The Court followed *Harjo* v. *Johnson*, 187 Okla. 561, 104 P. (2nd) 985, and other Oklahoma cases holding that under Oklahoma law a vendee from one who practices fraud in securing a judgment and purchases at his own sale cannot be a bona fide purchaser. The Court stated:

> "We conclude that Shell was not a bona fide purchaser." (R. 153).

As Judge Huxman put it in his concurring opinion:

> "When Wilkin redeemed, title to the property was reinvested in him. Shell's title failed with the failure of the title to its grantor, the State of Oklahoma. This is so because Shell was not, and under the undisputed facts in the record, could not become a bona fide purchaser for value without notice. It was bound

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[3] *Morgan* v. *City of Ardmore*, 182 Okl. 542, 78 P.(2d)785, 788, (overruled as to a part not here material in *City of Bristow* v. *Groom*, 194 Okl. 334 151 P. (2d) 936, 939); *Harjo* v. *Johnson*, 187 Okl. 561, 104 P.(2) 985, 996; *Arnold* v. *Joines*, 50 Okl. 4, 150 P. 130, 134.

[4] *Harjo* v. *Johnson* 187 Okl. 561, 104 P.(2) 985, 995-997; *Morgan* v. *City of Ardmore*, 182 Okl. 542, 78 P. (2nd) 785, 788.

to take notice and have knowledge of the law and was thus bound to know that if Wilkin was in the service he had the right to redeem upon return therefrom and, if he did, its title would fail with the ending of the title of his grantor." (R. 159).

In such a case Shell was a purchaser *pendente lite.* (*Mellen* v. *Moline Iron Co.*, 131 U. S. 352; *Stuart* v. *Coleman*, 78 Okla. 81, 188 Pac. 1063; *Arnold* v. *Joines*, 50 Okla. 4, 150 Pac. 130).

It follows that Shell could not be a purchaser in good faith (1) because of its predecessor's fraud, coupled with purchase at its own sale and (2) because Shell was on notice that *if* Wilkin was in the service he could redeem under the *Soldiers and Sailors Relief Act*, 50 U.S.C. App. Sec. 525.[1] Wilkin's rights of redemption were certainly not defeated by a false affidavit; his rights of redemption were absolute and were so intended by Congress.

B. *Wilkin's Redemption Was Valid Under Another Oklahoma Statute*:

Under 12 *O. S. A.* Sec. 760[2] where the mortgage contains as here the words "appraisement waived" (R. 15) no order of sale can issue for six months. The Supreme Court of Oklahoma has held this law a true redemption

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[1] Quoted, present brief p. 8 footnote 1.

[2] 12 *Oklahoma Statutes Annotated* Sec. 760:

"If the words 'appraisement waived' or other words of similar import, shall be inserted in any deed, mortgages, bonds, notes, bill or written contract, any court rendering judgment thereon, shall order as a part of the judgment that the same, and any process issued thereon, shall be enforced, and that lands and tenements may be sold thereunder without appraisement; and such judgment, and any process issued thereon, shall be enforced, and sales of land and tenements made thereunder, without any appraisement or valuation being made of the property, to be sold: Provided, That no order of sale or execution shall be issued upon such judgment until the expiration of six months from the time of the rendition of said judgment."

statute (*Miller* v. *Farmers National Bank*, 94 Okla. 101, 221 P. 71) and the foreclosure judgment herein provides for a six months' redemption period. (R. 17). The Court below held that under the *Soldiers and Sailors Relief Act*, 50 U.S.C. App. Sec. 525 [1] the period of Wilkin's military service must be added to the six months' redemption period provided in 12 *O.S.A.* Sec. 760. Hence it held the redemption was valid under this statute (R. 155-157). Shell argues to this Court that Sec. 525 applies only where a State law allows redemption *after* sale, not the case in Oklahoma. The Court below, however, on the basis of this Court's decision in *Le Maistre* v. *Leffers*, 333 U. S. 1 held that the test for the applicability of Sec. 525 was what started the running of the period for redemption not the presence or absence of a technical conveyance of title. There was no delivery of title in *Le Maistre* v. *Leffers*, supra.

Entirely aside from Shell's narrow and repudiated construction of Sec. 525, Shell's argument is beside the point because of the first sentence in Sec. 525 which excludes the period of military service "for the bringing of any action or proceeding in any court * * * *by* or against any person in military service." Wilkin's motion to redeem was a "proceeding," [2] which, under 12 *O.S.A.* 760, could be instituted within six months, as extended by the term

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[1] 50 *U.S.C.A.* App., Sec. 525, in part, reads:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law * * * for the bringing of any action or proceeding in any court * * * *by* or against any person in military service * * *, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

[2] *Bradshaw* v. *Eudahy*, 202 Okla. 640, 217 P.(2d) 522.

of military service. Hence even if the last part of Sec. 525 applies only to actual completed sales (which would leave all Oklahoma service men defenseless) the first part of Sec. 525 gives a complete remedy by extending the period for redemption proceedings.

It follows from the above that there are substantial bases for the judgment below.

II.

The Court Below Did Not Refuse to Follow Oklahoma Law.

Shell claims (p. 9-13) that the Court below refused to follow Oklahoma law in its holding that Shell purchased *pendente lite*. Shell contends (Pet., p. 13) that the Court below "in holding that the two Kansas cases interpreting *12 O.S.A.* Sec. 176 prior to adoption by Oklahoma were not binding on it" is in conflict with the Eighth and Ninth Circuit. The charge is made out of the whole cloth. The Court below made no such holding and never even mentioned the two Kansas cases, *Howard* v. *Entreken*, 24 Kans. 308 and *Pritchard* v. *Madren*, 31 Kans. 38, 2 P. 691.[1] The Eighth and Ninth Circuit cases deal only with legislative adoption generally and not with the present matter.

Shell's point appears to be that under the Kansas cases a judgment based on an order of publication is a final judgment. This is meaningless unless Shell couples with it proof that it was "a purchaser in good faith" under 12 *O.S.A.* Section 176.[2] But the Court below showed con-

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[1] The court cited (R. 154, footnote 10) cases holding that a purchaser takes subject to the statutory power of the court to open up a default. These cases seem peculiarly applicable since the *Soldiers and Sailors Relief Act* manifestly contemplates that many defaults will be opened up on the soldier's return.

[2] As Shell brought the present suit to clear title it naturally had the burden of proof and could only recover on the strength of its

clusively that Shell's vendor was guilty of fraud in filing the false affidavit and that when the vendor's title fell, Shell's fell also.[1] Judge Huxman concurred with the remark that "Shell was not, and under the undisputed facts in the record, could not become a bona fide purchaser for value without notice." (R. 159).

A second answer is that the Kansas cases, decided years ago, naturally fail to take into consideration the fact that the *Soldiers and Sailors Relief Act* is read into every State redemption statute. (*Le Maistre* v. *Leffers*, 333 U.S. 1; see also *Illinois National Bank* v. *Gwinn*, 390 Ill. 345, 354 61 N.E. (2nd) 249, 254 159 A.L.R. 468). This statute puts everyone on notice that, under Sec. 525, if the mortgagor is a soldier, his time in the Army must be added on to any statutory period of redemption. Wilkin was a soldier and did so redeem.[2] Hence entirely aside from the Court's holding as to non-finality of judgments obtained by publication there is an independent federal ground of decision herein adequate to sustain the judgment. This was the specific holding of the concurring opinion of Judge Huxman. (R. 158-159).

Lastly, as already seen, there is an independent *State* ground of decision adequate to sustain the judgment i.e. 12 *O.S.A.* Sec. 760. That statute where appraisal is waived allows six months for redemption and under Sec.

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own title. (*Martin* v. *Rogers*, 151 Okla. 51, 1 Pac. (2d) 696; *Kasner* v. *Routledge*, 199 Okla. 550, 188 Pac. (2d) 227; *Seifert* v. *Seifert*, 82 Okla. 230, 200 Pac. 243; *Knoell* v. *Frisco Lease*, 78 F.(2d) 286 (C. C. A. 10)

[1] Citing *Morgan* v. *Ardmore*, 182 Okla. 542, 544 78 P. (2nd) 785, 788; *Harjo* v. *Johnson*, 187 Okla. 561, 572 104 P. (2nd) 985; *Arnold* v. *Joines*, 50 Okla. 4, 18-19 150 P. 130 134.

[2] The soldier is only required to redeem once and not repeatedly from all subsequent purchasers. (*Illinois National Bank* v. *Gwinn*, 390 Ill. 345, 358-359 61 N.E. (2nd) 249, 255-256 159 A.L.R. 468).

525 of the *Soldiers and Sailors Relief Act* time in service must be added to that six months period. Sec. 525 provides that the period of military service must be added in computing any period "for the bringing of any action or proceeding in any court." The motion to redeem was a "proceeding." It should be noted also that 12 *O.S.A.* Sec. 760 confers an absolute right and makes no exception in favor of purchasers in good faith.

The six months statute, 12 *O.S.A. Sec. 760,* (where appraisal is waived) was specifically cited by the court below as one of the grounds of its decision (Op. R. 155-157).

III.

Res Judicata Bars Shell.

State v. *Wilkin, supra,* upholds the legality of Wilkin's redemption of his property. The issues in that case were the same as in the present case. The parties were the same, Shell being represented by its privy the State.[1] *State* v. *Wilkin* is thus res judicata against Shell which purchased before the expiration of the soldier's redemption period under 12 *O.S.A.* Sec. 760 as extended by Sec. 525 of the Soldiers and Sailors Relief Act.

If under the *Soldiers and Sailors Relief Act* only one redemption is necessary (*Illinois National Bank* v. *Gwinn,* 390 Ill. 345 358-359; 61 N.E. (2nd) 249 255-256), it follows that an adjudication in *State* v. *Wilkin, supra,* of the validity of a redemption is binding upon a subsequent purchaser such as Shell. Particularly is this so in the present case where Shell refused to enter the State Court proceed-

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[1] Shell was in obvious privity with the State (*Romig* v. *Gillett,* 187 U.S. 111, 116 *Stacy* v. *Thrasher,* 6 How. 44, 59).

ings though invited so to do. (R. 47-48). It follows that *State* v. *Wilkin, supra,* upholding Wilkin's redemption is *res judicata* against Shell.

During the period of redemption, as extended, the foreclosure suit continued in court, subject to possible appearance of the soldier. If so, the suit was "pending" during this period. Under the circumstances Shell could not be a bona fide purchaser. As the Court below said:

> "One who, with notice of a pending action, purchases, from a party thereto, land involved in the action, • • • takes subject to the rights of the parties to the litigation as finally determined by the judgment or decree in such action.[9]"

As Judge Huxman said:

> "Shell • • • under the undisputed facts • • • could not become a bona fide purchaser for value without notice." (R. 159).

A contrary rule would enable anyone to circumvent the statute merely by conveying to a third, supposedly innocent, party.

IV.

The Decision Below Was Correct and No Matter of Public Importance Is Involved.

This Court in *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 stated "• • • ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."[1] Shell's principal argument for certiorari is the claim the court below did not follow state law as to finality of judgment in cases of service by pub-

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[9] *Moore* v. *Zelic,* 338 Ill. 583, 170 N.E. 664, 666; *Brockman* v. *Roberts,* 89 Okl. 57, 213 P. 545, 546.

[1] See also *Texas and N.O.R. Co.* v. *Neill,* 302 U.S. 645.

lication (12 *O.S.A.* 176). This claim has already, we feel, been convincingly answered. But, as seen above, there are other substantial grounds for the decision below. The plain fact is that Shell's vendor, the State, was guilty of gross fraud practiced upon a service man and got found out. Wilkin's redemption whether under 12 *O.S.A.* 176, 12 *O.S.A.* 760 or the *Soldiers and Sailors Relief Act* or under all combined seems clearly the right result. Shell's argument that the decision below will unsettle land titles in Oklahoma can be taken with a grain of salt. The present case upholds a soldier's right of redemption which is what Congress intended under the *Soldiers and Sailors Relief Act.* If companies purchasing soldiers' property must, under the present decision, take that Act into consideration before purchasing we can only say that this too would appear to come within the intention of Congress.

CONCLUSION

The petition herein should be denied.

Respectfully submitted,

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INDEX.

	PAGE
Foreword	1
Corrections of mis-statements made by respondents	2
The State's alleged fraud and Shell's status as a purchaser in good faith are not before the Court in this case	3
Okla. Stats. 1941, Title 12, Sec. 760, is not applicable	4
Shell did not purchase *pendente lite*	7
Summary of Respondents' authorities	7
Summary of Petitioner's authorities	9
The vacation judgment is not res judicata against Shell.	10
Conclusion	11

Table of Cases.

Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161	7, 9
Arnold v. Joines, 50 Okl. 4, 150 Pac. 130	7
Berkey v. Rader, 116 Okl. 258, 244 Pac. 184, 186	4
Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815	9
Bradshaw v. Eudaly, 202 Okl. 640, 217 P. (2d) 522	5
Brockman v. Roberts, 89 Okl. 57, 213 Pac. 545	8
Cudjo v. Harris, 119 Okl. 69, 248 Pac. 343	5
Harding v. Gillett, 25 Okl. 199, 107 Pac. 665	10
Harjo v. Johnston, 187 Okl. 561, 104 P. (2d) 985	4, 8
Howard v. Entreken, 24 Kan. 428	9
Illinois National Bank v. Gwinn, 390 Ill. 345, 61 N. E. (2d) 249	5, 8
Jones v. Driskell, 94 Mo. 190, 7 S. W. 111	9
LeMaistre v. Leffers, 333 U. S. 1	5, 8
Mellen v. Moline Iron Co., 131 U. S. 352	8
Moore v. Zelic, 338 Ill. 583, 170 N. E. 664	8

TABLE OF CASES—Continued.

	PAGE
Morgan v. City of Ardmore, 182 Okl. 542, 78 P. (2d) 786	7
Pritchard v. Madren, 31 Kan. 38, 2 Pac. 691	9
Robb v. Vos, 155 U. S. 13	6
Romig v. Gillett, 187 U. S. 111	7,10
Scudder v. Sargent, 15 Neb. 102, 17 N. W. 369	9
Siddell v. McMillan, 45 Okl. 800, 146 Pac. 911	8,9
Stacy v. Thrasher, 6 How. 44	10
State v. Wilkin, 202 Okl. 177, 211 P. (2d) 509	7
Streets v. Stephens, 191 Okl. 289, 129 P. (2d) 848, 849	5
Stuart v. Coleman, 78 Okl. 81, 188 Pac. 1063	8
Sunray Oil Corp. v. American Royalty Petroleum Co., 203 Okl. 637, 224 P. (2d) 965	3,9
Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462, 463	4,8,9
Wise v. Davis, 132 Okl. 65, 269 Pac. 248, 252	11
Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co., 26 Okl. 13, 108 Pac. 386, 388	9

Statutes.

Okla. Stats. 1941, Title 12, Sec. 176	3
Okla. Stats. 1941, Title 12, Sec. 180	9
Okla. Stats. Ann., Title 12, Sec. 760 (12 O. S. 1941, Sec. 760)	4
U. S. C. A. App., Vol. 50, Sec. 525	6

Text Books.

C. J. S., Vol. 49, p. 642	11

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1952.

No. 272

Shell Oil Company, *Petitioner,*
vs.
R. O. Wilkin; Walter E. Hocker, Jr.; Martha Hocker; F. M. Hocker, Nellie M. Scott and Carmen Gilkerson, Executrices of Estate of J. G. Scott, Deceased; Carmen Gilkerson; Nellie M. Scott; Merial Scott; John Lee Scott; Eugene A. Grubitz, 3rd; Doris Grubitz; W. R. Withington; Robert P. Singletary and W. J. Singletary, Jr., *Respondents.*

REPLY BRIEF *of* PETITIONER.

Shell purchased its three oil and gas leases (R. 19) *after* final foreclosure judgment (R. 13) and final order of confirmation (R. 18) and *before Wilkin commenced his proceeding* against the State *to vacate* the foreclosure judgments. (R. 21) Shell was not made a party to the vacation proceedings and received no notice thereof until 2½ years later. (R. 26) By that time the vacation judgment against the State had been appealed to the Supreme Court of Oklahoma (R. 26) and it was too late for Shell to intervene and contest the allegations of Wilkin's application, which the State had admitted by standing on its demurrer. (R. 34)

Question: Did Shell purchase *pendente lite?*

Corrections of Mis-statements Made by Respondents.

Respondents assert (Brief 2) that the State's mortgage became delinquent while Wilkin was in the army, whereas actually *the mortgage debt and taxes had both been in default* for more than five years when Wilkin purchased this land (R. 42) and for *more than seven years when Wilkin entered the armed forces* in 1942. Wilkin paid $25 or $50 for this land (R. 59) in 1940. (R. 11) He collected one or two years' rental (R. 78), but never paid anything on the mortgage debt or taxes. (R. 92) He was not financially able to do so. (R. 93) He made more money while in the army than he had before. (R. 93)

Respondents assert that Wilkin paid the amount due on the mortgage and taxes and refused to accept the bonuses and rentals Shell paid the State *before the case was appealed* to the Supreme Court of Oklahoma. (Brief 4) Such refusal (R. 43) and payment (R. 46) took place *after the judgment had been affirmed by the Supreme Court,* and eight months after Shell's leases had become valuable by reason of Shell's drilling activities. (R. 46-47)

Respondents assert that the State was guilty of fraud "and got found out." (Brief 13) Wilkin's vacation proceeding against the State did not raise any question of fraud, and it cannot be raised for the first time in this collateral proceeding. It is not contended that Shell participated in or knew anything about the alleged fraud. The truth of the matter is: Shell paid the State a bonus of $3420 for its three leases. (R. 23) By the time Wilkin filed his application to vacate the foreclosure judgment *these leases had decreased in value to $600.* (R. 46) It was therefore to Wilkin's advantage to ratify Shell's leases by suing the State for the $3420 bonus money. (R. 23) Three

years later, *by reason of Shell's drilling activities* (R. 46-47), the royalty payable under Shell's leases was worth $2500 an acre, or *one-half million dollars.* (R. 103) Wilkin was not satisfied with his good fortune. He waited another eight months and then attempted to revoke his ratification of Shell's oil and gas leases by refusing to accept payment of his judgment against the State for bonuses and rentals paid by Shell. (R. 43) After the risk was over, after the value of the royalty Wilkin recovered from the State had increased to one-half million dollars, and after the value of Shell's leases had increased from $600 to several hundred thousand dollars (R. 47), Wilkin and his assigns (the other respondents) attempted to revoke his ratification and cancel Shell's leases.

All emphasis supplied by us.

The State's Alleged Fraud and Shell's Status as a Purchaser in Good Faith Are Not Before the Court in This Case.

Respondents attempt to inject into this case matters which could be determined only in a direct attack on the mortgage foreclosure judgment in the state court. Wilkin could have brought an action to vacate the foreclosure judgment on the ground of fraud. *He did not do so.* Wilkin could have made Shell a party to the vacation proceedings in the state court and contended it was not a purchaser in good faith.[1] *He did not do so. Fraud was not even mentioned in the vacation proceedings, and Shell was not made a party or given notice thereof.* The present action was brought by Shell to quiet title to its oil and gas leases. It introduced in evidence the foreclosure judgment, order of

1. While not material here, *Shell was a purchaser in good faith* under the Oklahoma cases construing 12 O. S. 1941, Sec. 176. Sunray Oil Corp. v. American Royalty Petroleum Co., 203 Okl. 637, 224 P. (2d) 965. Cases cited by respondents do not involve reopenings under Section 176.

confirmation, and sheriff's deed in support of its title. (R. 103-104) These muniments of title may not be collaterally attacked in this quiet title action, either for fraud or on the ground that Shell was not a purchaser in good faith. Those questions are immaterial in this action. We concede that if Shell purchased *pendente lite* it is bound by the vacation judgment entered against the State. This would be true regardless of the alleged fraud and without regard to the question of whether Shell was a purchaser in good faith. On the other hand, *if Shell did not purchase pendente lite, the vacation judgment against the State is not binding on Shell* and the trial court properly held such judgment was not admissible in evidence against Shell in this action. (R. 116)

Even if Wilkin had vacated the judgment against the State for fraud, such vacation judgment would not have been admissible in evidence in this case as against Shell. Under Oklahoma law *the vendee of a plaintiff under a fraudulent judgment does not purchase pendente lite. Van Noy* v. *Jackson,* 68 Okl. 44, 171 Pac. 462, 463. This *pendente lite* question was not involved in *Harjo* v. *Johnston,* 187 Okl. 561, 104 P. (2d) 985, cited by respondents. Therein *the vendee was made a party to the vacation proceedings.* When a judgment is vacated under Section 176, *the fraud of the plaintiff does not affect the rights of his vendee.*[2]

12 O. S. 1941, Section 760, Is Not Applicable.

On page 8 of their brief respondents *incorrectly assert* that Wilkin's application in the state court was a proceeding under 12 O. S. A., Section 760 (12 O. S. 1941, Sec. 760), which provides for a stay of proceedings for six months in those cases where appraisement is waived in a mortgage.

2. Berkey v. Rader, 116 Okl. 258, 244 Pac. 184, 186.

They cite *Bradshaw* v. *Eudaly*, 202 Okl. 640, 217 P. (2d) 522, in support of this erroneous statement. *The Bradshaw case does not even mention Section 760.* It does not involve a sale. It involved the vacation of a quiet title judgment *under Section 176.* It holds that a proceeding to reopen *under Section 176* is "not an action at law or suit in equity * * * but is *a special proceeding.* * * *" (p. 525)[3] Neither the Oklahoma statutes nor cases provide for any court proceeding under Section 760. It is not necessary. All Section 760 does is to postpone a sale of the mortgaged premises for a period of six months. During that six-months' period the mortgage judgment may be paid off, but it is not necessary to bring any action or proceeding to pay it. All that is necessary is to make payment to the Court Clerk, thereby satisfying the judgment of record. *The right to pay the foreclosure judgment ceases upon sale of the land.* There is no right of redemption *after sale* in Oklahoma.[4] Even if a sale is prematurely made and confirmed under Section 760, the order of confirmation is merely irregular and not void.[5]

Respondents cite two cases construing state statutes providing for the redemption of real property *after sale.*[6] In the *Illinois National Bank* case the redemption action *was brought against the vendee* under a state statute providing for redemption *after sale.*[6] The *LeMaistre* case[6] involved a state statute which provided for a redemption period *after sale,* and the *vendee was made a party* to the redemption proceedings. The untenable position was taken in the *Le-*

3. This case supports our contention that *the "suit in equity" to foreclose the State's mortgage ceased to pend with final judgment,* and the "special proceeding" to reopen did not commence until the application was filed. In the interim there was no case pending. It was during this interim that Shell purchased its oil and gas leases.

4. Streets v. Stephens, (1942) 191 Okl. 289, 129 P. (2d) 848, 849.

5. Cudjo v. Harris, 119 Okl. 69, 248 Pac. 343.

6. Illinois National Bank v. Gwinn, 390 Ill. 345, 61 N. E. (2d) 249; LeMaistre v. Leffers, 333 U. S. 1.

Maistre case that 50 U. S. C. A. App., Section 525 did not apply, since title did not pass until the redemption period had run. This Court correctly held Section 525 applies to all redemption periods *after sale,* and in the *LeMaistre* case *the Florida statute provided for a redemption period after an actual sale.* The Illinois and Florida cases are not in point. *It was not necessary in either case to vacate the foreclosure judgment.* Both cases involved statutes providing for redemption *after sale.* Oklahoma does not have such a statute. The redemption portion of Section 525 of the Relief Act does not, therefore, apply to Oklahoma and other states similarly situated.

Even if Section 525 be interpreted so as to apply to the equitable right to redeem from the mortgage indebtedness *prior to sale,* it would be necessary to proceed (*as Wilkin did*) under Section 176 to vacate the foreclosure judgment and order of confirmation and to cancel the sheriff's deed before Section 525 could become effective. The question would still remain as to whether Shell purchased *pendente lite* under Section 176.

Try as they may, respondents cannot change the nature of the vacation judgment Wilkin obtained against the State. In describing such judgment the Court of Appeals said:

> "On July 22, 1948, the state court entered a judgment in the foreclosure suit, in which *it adjudged that the judgment therein be vacated, the order of confirmation be set aside,* and the *sheriff's deed cancelled;* and ordered that the State make a full and complete *accounting of* * * * *bonuses received from oil and gas leases* on the land, * * *."[7] (R. 148)

The only judgment Wilkin has against the State is a judg-

7. Note the ratification of Shell's leases by a judgment against the State for bonuses paid it by Shell. Robb v. Vos, 155 U. S. 13.

ment *vacating* the foreclosure judgment and order of confirmation and canceling the sheriff's deed under Section 176.[8] If any judgment is *res judicata* against Shell, it is this vacation judgment. This is the only judgment that respondents plead as *res judicata.* (R. 6) We therefore return to the basic question: Did Shell purchase *pendente lite?*

Shell Did Not Purchase *Pendente Lite.*

In our petition we cited Oklahoma authorities showing the Oklahoma Legislature adopted Kansas decisions holding Shell did not purchase *pendente lite.* We supported these Kansas decisions by legal principles announced by the Supreme Court of Oklahoma in construing Section 176 and by cases from Nebraska, Minnesota, and Missouri interpreting identical or similar statutes. *Respondents have not attempted to refute a single authority cited by us. They do not take issue with the binding effect of the Kansas cases.* Instead they attempt to avoid these cases by discussing fraud and the status of Shell as a purchaser in good faith, which have nothing to do with the question of whether Shell purchased *pendente lite.* Even though a vendee is not a purchaser in good faith, he is entitled to his day in court if he does not purchase *pendente lite.*[9]

Summary of Respondents' Authorities:

It is significant that respondents do not cite a single authority involving Section 176 or similar statutes from other states. Their cases all fall into the following groups:

1. Cases involving *void* judgments.[10] We concede

8. State v. Wilkin, 202 Okl. 177, 211 P. (2d) 509, held the foreclosure judgment had been vacated under Section 176. (p. 510)

9. Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161.

10. Morgan v. City of Ardmore, 182 Okl. 542, 78 P. (2d) 786; Arnold v. Joines, 50 Okl. 4, 150 Pac. 130; Romig v. Gillett, 187 U. S. 111.

that a purchaser under a void judgment takes nothing by the judgment, but stands in the shoes of his vendor. *The foreclosure judgment was not void.*

2. Cases in which the vendee purchased *after service of summons and prior to final judgment,* or while the case was *on appeal.*[11] Shell did not purchase prior to the foreclosure judgment or order of confirmation, and those final judgments were not appealed. It purchased after final judgment and prior to commencement of the vacation proceedings.

3. A case in which the *vendee was made a party* to the vacation proceedings.[12] In the *Harjo* case *plaintiff's vendee did not purchase pendente lite.*[13]

4. Cases involving redemption proceedings under a statute permitting redemption *after sale.*[14] In each case the *vendee was made a party* to the redemption proceedings. *Neither of these cases involved the vacation of a judgment.*

5. Cases involving *interlocutory judgments.* These cases from Illinois and Texas are discussed on page 14 of our petition. We concede that a purchaser under an interlocutory judgment purchases *pendente lite.* However, under Oklahoma law the foreclosure judgment and order of confirmation based on publication notice were final[15] and not interlocutory judgments.

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11. Mellen v. Moline Iron Co., 131 U. S. 352; Stuart v. Coleman, 78 Okl. 81, 188 Pac. 1063; Moore v. Zelic, 338 Ill. 583, 170 N. E. 664; Brockman v. Roberts, 89 Okl. 57, 213 Pac. 545.

12. Harjo v. Johnston, 187 Okl. 561, 104 P. (2d) 985.

13. Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462, 463.

14. LeMaistre v. Leffers, 333 U. S. 1; Illinois National Bank v. Gwinn, 390 Ill. 345, 61 N. E. (2d) 249.

15. Siddell v. McMillan, 45 Okl. 800, 146 Pac. 911.

Summary of Petitioner's Authorities:

Compare respondents' authorities with the authorities cited by petitioner, which construe Section 176, the Kansas statute prior to adoption by Oklahoma, and identical or similar statutes from other states.

1. *Cases from Kansas construing an identical statute prior to the adoption of the Oklahoma statute from that state.*[16] These cases were adopted by the Oklahoma Legislature and are binding on the Oklahoma courts.[17]

2. Oklahoma cases which necessarily hold a vendee after judgment and prior to application to reopen does not purchase *pendente lite.*[18] The *Siddell* case holds a judgment based on publication notice is a *final judgment.* The *Sunray* case holds the vendee was a purchaser in good faith. (A *pendente lite* purchaser cannot be a purchaser in good faith.[19]) The *Van Noy* case holds a vendee under a judgment later *vacated for fraud* is not a *pendente lite* purchaser. The *Blackwell* case holds the vendee under a judgment later *vacated by an infant* does not purchase *pendente lite.*

3. Cases from other states having identical or similar statutes which hold such vendee does not purchase *pendente lite.*[20] Although under the Minnesota statute the vendee in the *Aldrich* case was not a purchaser in good faith, *the court held he did not purchase pendente lite.*

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16. Howard v. Entreken, 24 Kan. 428; Pritchard v. Madren, 31 Kan. 38, 2 Pac. 691.

17. Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co., 26 Okl. 13, 108 Pac. 386, 388.

18. Siddell v. McMillan, 45 Okl. 800, 146 Pac. 911; Sunray Oil Corporation v. American Royalty Petroleum Company, 203 Okl. 637, 224 P. (2d) 965; Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462, 463; Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815.

19. 12 O. S. 1941, Sec. 180.

20. Scudder v. Sargent, 15 Neb. 102, 17 N. W. 369; Jones v. Driskell, 94 Mo. 190, 7 S. W. 111; Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161.

The Vacation Judgment Is Not *Res Judicata* Against Shell.

Under Point III on page 11 of their brief respondents argue that Shell was in privity with the State and that the judgment against the State was *res judicata* as to it. This is another way of saying Shell purchased *pendente lite*. They cite two cases from this Court. In *Stacy* v. *Thrasher*, 6 How. 44, this Court held that an administrator for a decedent appointed in Mississippi was not in privity with the administrator of the same decedent appointed in Louisiana. We do not know why this case was cited. *Romig* v. *Gillett*, 187 U. S. 111, arose in Oklahoma, but it is not helpful to respondents for three reasons: (1) It involved a *void judgment;* (2) the *purchaser was made a party* to the vacation proceedings; and, (3) contrary to respondents' contentions, it holds that *a purchaser under a valid judgment* based on publication notice *does not purchase pendente lite*. This Court stated that a different situation would have existed in the *Romig* case if the judgment had not been defective. (p. 117) *Harding* v. *Gillett*, 25 Okl. 199, 107 Pac. 665, involved this same void judgment after the case had been remanded by this Court. Therein the Supreme Court of Oklahoma, in interpreting the opinion of this Court in the *Romig* case, said:

> "Speaking of the rights of Harding, the court said: 'Harding as the grantee of the purchaser at the foreclosure sale, stands in the shoes of the mortgagee.' *If* the court had intended to hold that the decree of foreclosure and *the foreclosure sale were valid*, it would not have used this language, for *Harding would* • • • *not stand in the shoes of the mortgagee*, but would stand as the owner of the absolute title to the property • • •." (p. 670)

Note the language of the Supreme Court of Oklahoma: *"If the * * * decree of foreclosure and the foreclosure sale were valid, * * * Harding* (the vendee) *would * * * not stand in the shoes of the mortgagee, * * *."* The foreclosure judgment in the case at bar *was a valid judgment;*[21] Shell did not stand in the shoes of the mortgagee, and the vacation judgment is not *res judicata* against it.

Conclusion.

Since Shell did not purchase *pendente lite,* it will be deprived of its property without due process of law unless this Court grants its petition for a writ of certiorari. In addition to the effect of this erroneous decision upon Shell, it establishes the following precedents:

1. That it is not necessary for a federal court to follow decisions adopted along with a statute from another state, even though such decisions are binding on the courts of the adopting state. This question is of vital interest to every state in the Union which has adopted statutes from other states.

2. That a vendee, after final judgment and before application to reopen, purchases *pendente lite* under 12 O. S. 1941, Section 176, and is bound by a vacation judgment against his grantor obtained without his knowledge in a proceeding to which he was not a party. This question affects every landowner in Oklahoma who has heretofore or who may hereafter purchase land in reliance upon a judgment based on publication service. He may be deprived of his land by a proceeding against his grantor who may, through lack of interest or actual connivance, permit a judgment to be vacated without contest.

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21. Wise v. Davis, 132 Okl. 65, 269 Pac. 248, 252; 49 C. J. S. 842.

For these reasons, and for the reasons stated in our Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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INDEX.

	PAGE
Statement	1
Reason for granting rehearing and issuing the writ	2
Baldwin v. Mayor, 188 Okl. 272, 108 P. (2d) 132	3
Berkey v. Rader, 116 Okl. 258, 244 Pac. 184	3
Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815	5
Coe v. Armour Fertilizer Works, 237 U. S. 413, 424	5
Dull v. Blackman, 169 U. S. 243	6
Howard v. Entreken, 24 Kan. 428	6
Nougue v. Clapp, 101 U. S. 551	5
Okla. Stats. 1941, Title 12, Sec. 176	2
Sunray Oil Corp. v. American Royalty Petroleum Co., 203 Okl. 637, 224 P. (2d) 965	3
Conclusion	6
Security Trust & S. V. Co. v. City of Lexington, 203 U. S. 323, 332	7
Certificate of Counsel	7

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No. 272

Shell Oil Company, *Petitioner,*

vs.

R. O. Wilkin; Walter E. Hocker, Jr.; Martha Hocker; F. M. Hocker, Nellie M. Scott and Carmen Gilkerson, executrices of Estate of J. G. Scott, deceased; Carmen Gilkerson; Nellie M. Scott; Merial Scott; John Lee Scott; Eugene A. Grubitz, 3rd; Doris Grubitz; W. R. Withington; Robert P. Singletary; and W. J. Singletary, Jr., *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF *CERTIORARI.*

Petitioner prays that this Court grant rehearing of its order of October 20, 1952, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Tenth Court of Appeals in the above entitled case as prayed for in the petition filed August 14, 1952, herein.

Statement.

The State of Oklahoma served respondent R. O. Wilkin by publication notice and foreclosed a mortgage by a judgment dated June 24, 1943. (R. 13) A sale to the State was confirmed by the court. (R. 18-19) On May 7, 1945, after the term of court and time for appeal had expired,

Shell purchased three oil and gas leases from the State. (R. 19) Eleven months later Wilkin commenced a proceeding against the State to vacate the foreclosure judgments. (R. 21) The foreclosure judgment and order of confirmation were vacated. (R. 35) *Shell was not made a party, was not served with any process, and did not enter an appearance in the vacation proceeding.* (R. 26) The trial court in this case held that since Shell was not served with process the vacation judgment against the State was not admissible in evidence against Shell. (R. 116) The Court of Appeals reversed the trial court and canceled Shell's oil and gas leases in so far as they cover Wilkin's one-half interest. (R. 143-159, 163-164)

Reason for Granting Rehearing and Issuing the Writ.

Shell was not served with process and was not afforded an opportunity to defend its property in the vacation proceeding brought by Wilkin against the State of Oklahoma. The vacation judgment did not purport to vacate the foreclosure judgment as against Shell. On the contrary, *it ordered the State to account to Wilkin for bonus money paid it by Shell for oil and gas leases.* (R. 35-36) Nevertheless, the Court of Appeals held the vacation judgment was binding on Shell and used such judgment as a basis for canceling Shell's three oil and gas leases. (R. 155) By so doing, the judgment of the Court of Appeals deprived Shell of its property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Shell's pleading properly raised this question. (R. 10)

Under the Oklahoma decisions *the only remedy* afforded a purchaser in good faith under 12 O. S. 1941, Sec. 176, is for the Court to refuse to vacate the judgment as to him.

Berkey v. *Rader*, 116 Okl. 258, 244 Pac. 184; *Sunray Oil Corp.* v. *American Royalty Petroleum Co.*, 203 Okl. 637, 224 P. (2d) 965; *Baldwin* v. *Mayor*, 188 Okl. 272, 108 P. (2d) 132. The nature of the remedy is significant, since *it is not available in a Federal court.* In *Berkey* v. *Rader* the court ordered a judgment vacated as against the plaintiff, but *refused to vacate it as against the plaintiff's vendees.* The third syllabus by the court in *Sunray Oil Corp.* v. *American Royalty Petroleum Co., supra,* so clearly states the Oklahoma law that we quote it below:

> "A defendant is entitled to have a judgment entered against him quieting title to real property, resting only upon service by publication, set aside upon application made within three years from the date of the judgment pursuant to 12 O. S. 1941, Sec. 176, provided the defendant tenders with the application a valid defense to plaintiff's action. However *the application* of the defendant *should be denied* in so far as the rights of *strangers* to the proceedings are concerned *who have in good faith* and for value acquired an interest in the subject-matter after the rendition of the judgment and before the date application is made to set aside the judgment."

The only controversy between the reopening defendant and the purchaser in the Sunray case was—shall the judgment be vacated as against the purchaser? The defendant said yes. Sunray, the purchaser, said no, I am a purchaser in good faith. The trial court vacated the judgment in its entirety, but the Supreme Court held *the judgment should not have been vacated as against Sunray.* All Oklahoma cases apply the same rule as the *Sunray* case. *The Wilkin case is the first recorded case in which a subsequent purchaser was not served with process.* Suppose the purchasers in these Oklahoma cases had not been made parties to the

vacation proceedings. Would that fact deprive them of an opportunity to show the judgments should not be vacated as against them? Shell has been denied this opportunity. How could the state court determine Shell's status and vacate the foreclosure judgments as against it when it was not a party? *Shell should not be penalized and denied its day in court because Wilkin voluntarily refrained from making it a party to the vacation proceedings.* Due process of law is not dependent upon the whim of an opposing party.

A judgment based on publication notice cannot be vacated against a purchaser in good faith. Therefore, the question of good faith *must be* determined in an action properly brought in the *same court* to vacate the judgment. Shell's good faith could not be determined in Wilkin's action against the State. The State was not interested in that issue. It was an issue that could only be determined in a proper action between Wilkin and Shell. This issue could not be determined without bringing Shell before the court whose judgment was to be vacated within the three-year statutory period. Unless and until that is done, the foreclosure judgment and order of confirmation remain in full force and effect as to the interest of Shell. These judgments are invulnerable against a collateral attack.

The state court recognized the validity of the foreclosure judgments as to Shell. That court showed conclusively that it did not intend to vacate these judgments as against Shell, by rendering judgment against Shell's grantor, the State, and in favor of Wilkin for *"a full and complete accounting of all * * * bonuses for oil and gas leases * * *" paid by Shell to the State.* (R. 35-36) How could the Court of Appeals hold the foreclosure judgments were vacated as to Shell, when in the same vacation judgment Shell's

grantor was ordered to pay Wilkin all bonuses paid by Shell for its three oil and gas leases? Wilkin would not have been entitled to these bonuses if the foreclosure judgments had been vacated as to Shell.

By determining in this collateral proceeding that the foreclosure judgments are invalid as to Shell and that its leases should be canceled, the Court of Appeals has in reality attempted to set aside the state court's foreclosure judgment and order of confirmation. This the Court of Appeals was without jurisdiction to do. *Nougue* v. *Clapp*, 101 U. S. 551. *The effect of the opinion of the Court of Appeals was to hold that Shell's leases should be canceled because it would not have prevailed in the state court on the merits if it had been afforded its day in court.* The requirements necessary to constitute due process of law are not dependent upon the merits of a case:

> "• • • To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. • • •" *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424.

The question here is not whether Shell was a purchaser in good faith, but whether the Court of Appeals could hold that the foreclosure judgments stood vacated as to Shell because it was not a purchaser in good faith when that question had never been passed upon in a direct proceeding brought against it for the purpose of vacating the foreclosure judgments. In *Blackwell* v. *McCall*, 54 Okl. 96, 153 Pac. 815, the Supreme Court of Oklahoma held that where a judgment was vacated without making a purchaser after judgment a party to the vacation proceeding the vacation judgment was not admissible in evidence against such pur-

chaser in a subsequent action brought in the same court. *The trial court cited and followed the Blackwell case.* (R. 116) The *Blackwell* case announces the law of Oklahoma and is binding on this Court. Shell was entitled to its day in court to show, if it could, that the judgment should not be vacated as against it. It has been denied this right, contrary to the due process provision of the Constitution of the United States, and contrary to the holding of this Court in *Dull* v. *Blackman,* 169 U. S. 243, quoted from and relied upon by the Supreme Court of Oklahoma in the *Blackwell* case.

In discussing this question, the Supreme Court of Kansas, in *Howard* v. *Entreken,* 24 Kan. 428, said:

> "The district court committed no error in refusing to admit in evidence the vacation of the judgment of *Abbott* v. *Smith,* or the other matters offered in rebuttal to the decree of December 9, 1868." (p. 431)

The *Howard* case involved the identical publication statute later adopted by Oklahoma. It is as binding on this Court as would be a decision of the Supreme Court of Oklahoma.

Conclusion.

Shell did not have its day in the state court, because it was not made a party and served with process. Shell has not had its day in the Federal court, because the Court of Appeals held the judgment in the state court, wherein it was not served with process, was *res judicata.* If the opinion of the Court of Appeals stands, Shell will be deprived of its oil and gas leases by reason of the vacation judgment rendered in a proceeding to which it was not made a party, without service of process, and without having been given an opportunity to be heard. Regardless of the merits of the case, the benefit of notice and a hearing before judgment

is not a matter of grace, but rather is one of the rights guaranteed by the due process provision of the Constitution of the United States. *Security Trust & S. V. Co.* v. *City of Lexington*, 203 U. S. 323, 332.

For the reasons set forth above and in the petition for writ of *certiorari*, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of *certiorari* issue to the Tenth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

.....,

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Counsel for Petitioner.